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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party/Petitioner. And PURPLE COMMUNICATIONS, INC. Employer,	Case No. 21-CA-095151; 21-RC-091531; 21-RC-091584. **REQUEST FOR SPECIAL PERMISSION TO APPEAL DECISION OF ADMINISTRATIVE LAW JUDGE** **361 NLRB NO. 126 (2014)**

Pursuant to Section 102.25 of the rules, the Charging Party hereby requests special permission to appeal the attached Order of the Administrative Law Judge (Exhibit A) closing the record and refusing to allow the parties to present any evidence on the issues remanded by the Board.

When the full Board decided this case, it remanded this matter to the Administrative Law Judge.

The Board's remand was very clear. The Board's ORDER states:

> IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issues and shall prepare a supplemental decision…

See pages 17-18 of the Board's Decision and Order Remanding.

The Board stated at page 2 of the Decision and Order Remanding:

> We remand the issue to the judge for him to reopen the record and afford the parties an opportunity to present evidence relevant to the standard we adopt today, and the judge for him to prepare a supplemental decision containing findings of fact and conclusions of law, and a recommended Order, consistent with this Decision and Order.

The remand Order specifically states that "the judge shall afford the parties an opportunity to present evidence on the remanded issues."

The Board also clarified this at page 17 of the Decision and Order Remanding:

> As stated, however, we will remand this aspect of this case to the administrative law judge for further proceedings consistent with this decision, including allowing the parties to introduce evidence relevant to a determination of lawfulness of the Respondent's electronic communications policy.

The Order of the ALJ, which is attached, not only ignored but repudiated the remand order. The ALJ has foreclosed the Charging Party from making a further evidentiary record.

During prehearing phone conferences, the Administrative Law Judge indicated that he was considering foreclosing either counsel for the General Counsel or Charging Party from presenting any evidence if the Respondent did not plan on putting on any evidence on the special circumstances defense. In response, the Charging Party filed an objection attached as Exhibit B. The Administrative Law Judge nonetheless issued his Order foreclosing the hearing and rejecting the Objection without commenting on it. He simply ignored the arguments and offers without explanation and set a briefing schedule.

Nothing in the Board's Decision and Order Remanding suggests the remand is limited to allowing only the Respondent to put on evidence only as to whether it has special circumstances to justify its electronic communications policy. The remand was for not an "issue" but "issues." The Board established a new standard and contemplated a remand for the parties to make a full record. By foreclosing the Charging Party from presenting any evidence, the ALJ violated the clear terms of the Board's remand.

The ALJ was also misled (if not confused) by the Respondent's letter attached to the ALJ's Order. The letter from counsel states that the Respondent does not intend to present "any *additional* evidence on the special circumstance issue remanded by the Board for hearing in the

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above-referenced case." Respondent's letter (emphasis supplied). As a result, the employer, we assume, intends to rely on some evidence in the record to establish special circumstances or otherwise justify its policy. The ALJ was apparently misled and thought this meant that there would be no claim made of special circumstances. The letter stating that it does not intend on "submitting any argument to the Administrative Law Judge either by brief or otherwise..." does not foreclose filing Exceptions or relying on evidence already in the record in a challenge to any Board Order in a Circuit Court. The letter from counsel for Purple Communications is to the contrary. The letter leaves this open, and the ALJ erroneously did not carefully read or understand the position that the Respondent is taking.[1]

The Charging Party should be allowed to present evidence that there are no special circumstances. The Charging Party should be allowed to make an evidentiary record to prove the circumstances, including free use of the email during work and non-work time, support any Board decision.

Furthermore, nothing in the Board's Decision and Order Remanding forecloses the Charging Party from proving that Video Relay Interpreters should have access to the company's email during work hours. We have explained this further in the attached objection.

There are a number of Board cases where employees have been allowed to use the company email during work hours. See dissent of Member Miscimarra at footnote 37 and dissent of Member Johnson at text for footnotes 55-57. See also, *Hitachi Capital Am. Corp*, 361 NLRB No. 19 (2014). The Board has thus repeatedly found that where employees are allowed to use the email during work time, they can't be disciplined because the employer dislikes what is stated or transmitted on the email where the email involves protected concerted activity. This issue remains in the case encompassed by the Board's remand.

[1] The employer is obviously planning a Circuit Court challenge because, under the Board's Decision, the policy violates the Act, and a Decision and Order finding a violation is a foregone conclusion. If the Respondent was not intent on limiting the record in anticipation of a further challenge in a Circuit Court, it could have settled the allegation.

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The ALJ's Order forecloses the Charging Party from putting on evidence as to the appropriate remedy (for example, whether posting should be in all facilities, whether it should be electronic by way of Purple's intranet or otherwise).

Finally, although the Board stated that it was not necessary to reach the question of whether the discrimination test in *Register Guard* should be overruled, see footnote 13, that is an issue which remains for purposes of any defense which Purple Communications may raise. The Charging Party wishes to present evidence on that issue.

In summary, this Request for Special Permission to Appeal should be granted. The Appeal should be granted, and the ALJ should be directed to open the record to allow the parties to present evidence. The Board's remand was clear that the parties were allowed to present evidence. *Purple Communications* stands as an important precedent, and any further Decision from the Board with an anticipated Circuit Court challenge should be based on an adequate record.

Dated: February 17, 2015

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/S/ DAVID A. ROSENFELD
By: DAVID A. ROSENFELD
Attorneys for Charging Party/Petitioner
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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 17, 2015, I served the following documents in the manner described below:

CHARGING PARTY'S REQUEST FOR SPECIAL PERMISSION TO APPEAL DECISION OF THE ADMINISTRATIVE LAW JUDGE 361 NLRB NO. 126 (2014)

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Via Email

Robert J. Kane
STUART KANE
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Via Email
Olivia Garcia, Regional Director
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National Labor Relations Board, Region 21
888 S. Figueroa Street, Floor 9
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Honorable Paul Bogas
Administrative Law Judge
Division Of Judges
109914th Street, NW, Room 5400 East
Washington, DC 20570-0001
Paul.bogas@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 17, 2015, at Alameda, California.

/s/Katrina Shaw
Katrina Shaw

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PURPLE COMMUNICATIONS, INC.

and

Case Nos. 21-CA-095151
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

ORDER

The Board, in its Decision and Order dated December 11, 2014, remanded the above-captioned case for further proceedings regarding the Respondent's electronic communications policy. The Board stated that it was overruling its prior decision in *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), by "adopting a presumption . . . . that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected on nonworking time." The Board emphasized that this presumption "is expressly limited to nonworking time." "An employer may rebut the presumption," the Board stated, "by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights." "[A]n assertion of special circumstances will require that the employer articulate the interest at issue and demonstrate how that interest supports the email use restrictions it has implemented."

The Respondent, by letter dated February 3, 2015, (attached) notified me that it would not, on remand, contend "that special circumstances, as defined in the Board's decision, exist to justify the business use only restriction that Respondent places on non-working time use of its e-mail system by employees" and would not present any evidence on the subject. Given that, under the Board's decision, it is the Respondent's burden to rebut the presumption by "articulat[ing] the interest at issue" and demonstrating the "special circumstances," no additional evidence need be taken at this time.

The parties have until March 10, 2015, to submit briefs for my consideration. I am affording the parties the opportunity to file briefs, but am not directing them to do so.

SO ORDERED

DATED: February 10, 2015

PAUL BOGAS
ADMINISTRATIVE LAW JUDGE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PURPLE COMMUNICATIONS, INC.

and

Case Nos. 21-CA-095151
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Service Sheet

A copy of the Order including (attached letter by the Respondent dated February 3, 2015) has been served by electronic mail upon the following:

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February 3, 2015

Via Overnight Delivery

Honorable Paul Bogas
Administrative Law Judge
Washington, D.C. Office
1099 14th Street, NW, Room 5400 East
Washington, DC 20570-0001

Re: *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*
Cases: 21-CA-095151; 21-RC-091531; and 21-RC-091584

Dear Judge Bogas:

As I informed your honor and counsel for the other parties in this matter in our conference call today, Respondent Purple Communications, Inc. will not be presenting any additional evidence on the special circumstances issue remanded by the Board for hearing in the above-referenced case.

Respondent also will not be submitting any argument to the Administrative Law Judge either by brief or otherwise, contending that special circumstances, as defined in the Board's decision, exist to justify the business use only restriction that Respondent places on non-working time use of its e-mail system by employees.

Very truly yours,

Robert J. Kane

RJK:*lmw*
cc: NLRB Division of Judges, Washington D.C. [Overnight Delivery]
Cecelia Valentine [Via E-mail: cecelia.valentine@nlrb.gov]
David A. Rosenfeld [Via E-mail: drosenfeld@unioncounsel.net]

EXHIBIT B

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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, Employer, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party/Petitioner.	Case No. 21-CA-095151; 21-RC-091531; 21-RC-091584 **CHARGING PARTY/PETITIONER'S OBJECTION TO CLOSING OF THE RECORD AND OFFER OF PROOF**

In a phone conference, the Administrative Law Judge has indicated that he will not allow the Charging Party to present additional evidence if the Respondent concludes that it will not provide any evidence on remand. We submit that this is plain error and submit this position statement to be made part of the record in this case before briefing.

The Board stated at page 2:

> We remand the issue to the judge for him to reopen the record and afford the parties an opportunity to present evidence relevant to the standard we adopt today, and the judge for him to prepare a supplemental decision containing findings of fact and conclusions of law, and a recommended Order, consistent with this Decision and Order.

The remand order specifically states that "the judge shall afford the parties an opportunity to present evidence on the remanded issues."

The Board went further and stated at page 17:

> As stated, however, we will remand this aspect of this case to the administrative law judge for further proceedings consistent with this decision, including allowing the parties to introduce evidence relevant to a determination of lawfulness Respondent's electronic communications policy.

Nothing in these statements suggests the remand is limited to allowing the Respondent to put on evidence only as to whether it has special circumstances to justify its electronic communications policy. The Board established a new standard and contemplated a remand for the parties to make a record.

The Board's ORDER states:

> IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issues…

The remand was not "issue" but "issues." The remand was not to allow only the Respondent but to allow the "parties" to present evidence. This Order was quite clear.

The Administrative Law Judge focused upon one sentence at page 17 in which the Board stated: "We will remand this issue to the Judge to allow the Respondent to present evidence of special circumstances justifying restrictions and imposes on employees' use of its email system." Such stray statements are not the remand order. The Board's Order clearly states the remand to the ALJ.

The Board thought that, as a matter of due process, the parties (and not just the Respondent) should be allowed to present evidence based upon its newly established standard for use of email. This is an issue that had been before the Board for close to 20 years in various cases. The Board, in a lengthy opinion, evaluated these issues and remanded to the Judge for the taking of additional evidence. It would violate the Charging Party's due process rights to foreclose it from presenting evidence where the Board thought that it was appropriate to allow, in the Administrative Law Judge's view, the Respondent to do so. This was not meant to be a one way street. Due process works both ways.

The Administrative Law Judge erroneously read the Board's decision to remand only for the sole purpose of allowing the Respondent to present evidence of special circumstances. The Board's remand, as noted above, was broader than that. It was clear, particularly from the

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ORDER provision, that the parties, and not just the Respondent, are allowed to present evidence on the issues. The ALJ is ultimately bound by the ORDER, not a portion of one sentence from the discussion in 17 pages. Federal Rule of Appellate Procedure 41, governing remands, has been similarly interpreted. The remand is governed by the court's remand, not any stray discussion in the court's opinion. This ensures that there is no ambiguity in the court's order and remand.

The charging Party proposes to present evidence to show that the company's electronic communications policy is invalid under section 8(a)(1) and 8(a)(3). Among other things, we will provide evidence as follows:

1. A consistent use of email and electronic communications by the employer on issues related to work concerning wages, hours and working conditions. The employer routinely communicated with video relay interpreters by use of email and other electronic communications regarding wages, hours and working conditions;
2. There will be no interference with or effect on the electronic communications systems by employees use of the email for protected concerted activity or other communication about wages, hours and working conditions;
3. Employees and the employer have consistently used the email system and other electronic communications systems during "working hours" for purposes of communicating about wages, hours and working conditions. The use of electronic communications for protected concerted activity or union activity cannot be limited simply to non-work hours.
4. The employer has encouraged and condoned use of the email and electronic communications systems during work hours for work related purposes, including communications about wages, hours and working conditions.
5. Video interpreters are not allowed to be interpreting during all work hours. In fact, they are required to stop interpreting for certain portions of every hour as an ergonomic and health and safety issue. As a result, although this time is "work

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time" because it is paid, there is no work that they have to perform. During this time they should be allowed to use the email and electronic communications systems.

6. The employer makes available email and electronic communications systems to the interpreters who use them throughout work time as well as non-work time.
7. There will be no interference with productivity or discipline if the employees use the email and electronic communications systems during work time and non-work time.
8. There are no circumstances which justify any prohibition against the employees from using email or electronic communications during non-work time.
9. Employees have used the company's email and electronic communications systems for communication about work related issues during non-work time with the approval or encouragement of the employer.

These are some of the facts that the charging Party will present. As noted, the Board is very clear to allow remand for both parties to present evidence.

Although the Board noted in a footnote it was not necessary to reach the discrimination issue under *Register-Guard*, see footnote 13, the Charging Party notes that this issue still remains in the case and believes that the above evidence will prove that the employer's application of the communications policy is discriminatory. It wishes to make a record as noted above about the discriminatory application.

The Administrative Law Judge has furthermore narrowly read the remand regarding the remedy issue. The Board noted that there was no back pay liability or reinstatement obligation. The only remedy as the Board noted is "its remedial obligations [which] will be limited to rescission of the policy and standard notifications to employees." See pg. 17. As noted above, the remand was broad and allowed both parties to present evidence. The Charging Party will present evidence to establish the standard notifications should include:

1. Email and other electronic communications system posting.

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2. Email or electronic communications directly to each video relay interpreter. This will be an appropriate remedy because the employer uses the email to communicate with the employees regarding working conditions.
3. A reading of the notice. This will be an appropriate and standard remedy in this case because an employer routinely reads notices and other information to video interpreters in group meetings.
4. Posting of the notice should be required on the employer's email and electronic communication systems as well as in each of the offices.
5. Employees should be advised of the notice posting because they are routinely advised of notices which they are supposed to read on electronic communication systems. This should apply to the Board Notice.
6. The Notice should be mailed to video relay interpreters who are no longer working for the company.
7. The Notice should be signed to the video relay interpreters.

The Administrative Law Judge too narrowly read the Board's remand. It is plain that it allows the parties to present evidence. The remand is not, as the Administrative Law Judge interpreted, limited simply to the Respondent's choice of whether to present special circumstances. The Charging Party should be allowed to rebut the suggestion that there are any circumstances or any justification to limit the use of email and electronic communications.

For these reasons, the Administrative Law Judge should allow the hearing to go forward so that the Charging Party can present evidence as required and permitted by the remand.

Dated: February 9, 2015

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